BOWSER COMMISSION

Legislative Services Agency
200 West Washington Street, Suite 301
Indianapolis, Indiana 46204-2789
Tel: (317) 233-0696 Fax: (317) 232-2554

Authority: Legislative Council Resolution 07-01

MEETING MINUTES[1]

Meeting Date:	**August 17, 2007**
Meeting Time:	**1:00 P.M.**
Meeting Place:	**State House, 200 W. Washington St., Room 431**
Meeting City:	**Indianapolis, Indiana**
Meeting Number:	**1**

Members Present: **Rep. David Orentlicher, Chairperson; Rep. Scott Pelath; Rep. Jonathan Elrod; Rep. Ralph Foley; Rep. Amos Thomas; Sen. Richard Bray, Vice-Chairperson; Sen. Brent Steele, Sen. Brent Waltz; Sen. Karen Tallian; Sen. Earline Rogers.**

Members Absent: **Rep. Vernon Smith; Sen. John Broden.**

Rep. Orentlicher, Chairperson of the Commission, called the meeting to order at 1:10 p.m.

After an introduction of the commission members, Rep. Orentlicher called for testimony.

Joseph Hoffmann, Acting Executive Associate Dean and Harry Pratter Professor of Law, Indiana University School of Law

Professor Hoffmann identified three instances in which the mental illness of a defendant in a capital case would be relevant: at the time of execution, at the time of trial, and at the time of the alleged capital crime.

(1) At Time of Execution -

The U.S. Supreme Court has issued two opinions barring the execution of a person who is guilty of murder but mentally ill.

---

[1] Exhibits and other materials referenced in these minutes can be inspected and copied in the Legislative Information Center in Room 230 of the State House in Indianapolis, Indiana. Requests for copies may be mailed to the Legislative Information Center, Legislative Services Agency, 200 West Washington Street, Indianapolis, IN 46204-2789. A fee of $0.15 per page and mailing costs will be charged for copies. These minutes are also available on the Internet at the General Assembly homepage. The URL address of the General Assembly homepage is http://www.in.gov/legislative/. No fee is charged for viewing, downloading, or printing minutes from the Internet.

- Ford v. Wainwright – In 1986, the U.S. Supreme Court ruled that execution of a mentally ill person is unconstitutional. The court found that the execution of a mentally ill defendant has questionable retributive value and not likely to deter further crimes by mentally ill persons. Justice Powell wrote that a person should not be executed if they do not understand that they are about to be executed and if they are not able to make peace with their beliefs. States are required to establish rules to ensure that these rights are provided to condemned offenders.

- Panetti v. Quarterman – In 2007, the U.S. Supreme Court ruled that a person's delusional beliefs about why they are going to be executed are relevant to whether they understand why they are going to be executed. Those who cannot rationally understand why they are to be executed should not be executed.

Based in part on these cases, Governor Daniels commuted the death sentence of Arthur Baird to life without parole because he was considered insane at the time of execution.

Professor Hoffmann noted that the U.S. Supreme Court made it clear that not all persons who experience mental illness may be exempt from the death penalty. There are a limited number of circumstances where a criminal defendant can avoid the death penalty for murder, and state courts are now developing rules to implement these exemptions based on the Ford decision.

He suggested that the General Assembly may wish to consider some type of legislative solution, possibly copying the Panetti decision into statute.

(2) At Time of Trial

Defendants are competent to stand trial if they understand the trial proceedings and can cooperate with their defense attorneys. In some cases, the mental illness of defendants will cause them not to contest the state's charge. Consequently, they will ask the state to execute them rather than challenging the death sentence resulting in sentences that may be later reversed by higher court. After the initial trial, a direct appeal of the death sentence to the state court of appeals is required for all defendants. An appeal from the conviction is not required, and after this appeal, any further challenges are optional.

(3) At Time of Alleged Capital Crime

If a sentencing court determines that criminal defendants were insane when they were convicted of the crimes they were accused of committing, the defendants are not responsible for their actions and are generally committed to a mental hospital.

Under Indiana death penalty statute, the jury must reconvene for a sentencing hearing if it convicts a defendant of murder. During the sentencing hearing, a jury must find with no reasonable doubt that at least one aggravating circumstance (such as the age of the victim and whether other types of crimes) also occurred. The defendant can present any mitigating circumstances leading to the crime. One of the mitigating circumstances is whether

> (t)he defendant's capacity to appreciate the criminality of the defendant's conduct or to conform that conduct to the requirements of law was substantially impaired as a result of mental disease or defect or of intoxication. [IC 35-50-2-9(c)(6)]

A defendant has an absolute right to state why the death penalty is not appropriate, including the defendant's mental state at the time that the crime was committed. The defendant's mental

state may be used as a mitigating circumstance. The mitigating circumstances are used to determine the severity of the sentence and can be used to lower the severity of the sentence so the trier of fact will not consider the death penalty, but either life without parole or a term of years.

Professor Hoffmann suggested that as an option the General Assembly could allow a pretrial hearing to determine whether a defendant was mentally ill at the time of the crime. If the person was mentally ill, then the prosecuting attorney would not be permitted to proceed with a death penalty request. Current law allows this when a defendant is being evaluated to determine if the defendant is mentally retarded.

Professor Hoffmann also cited two U.S. Supreme Court decisions that prohibited defendants under the age of 18 and mentally retarded from being eligible for the death penalty.

- In 2002, the U.S. Supreme Court issued the Atkins v. Virginia decision that establishes a barrier in case of mental retardation because mentally retarded defendants are considered less blameworthy for the crimes they commit.

- In 2005, the U.S. Supreme Court ruled in Roper v. Simmons that defendants who were younger than 18 at the time of the crime were prohibited from being executed.

During a question-and-answer period with the Commission members, Professor Hoffmann noted at least three reasons why no state has prohibited the death penalty for mentally ill offenders.

- There is no clear consensus about how to define mental illness.
- There is the political concern that defining mental illness is a slippery slope and that the definition is open to interpretation leading to the possible defacto abolition of the death penalty.
- The public is ambivalent about mentally ill defendants and the death penalty.

He told the Commission about current conflicts between Indiana law and a recent U.S. Supreme Court decision. The current statute specifies that if a jury cannot determine whether a defendant should be given the death penalty, the sentencing judge can decide whether a defendant can be given life without parole or the death penalty. He noted that this statute may conflict with the Ring v. Arizona decision issued in 2002 that held that allowing a sentencing judge, without a jury, to find aggravating circumstance necessary for imposition of the death penalty would violate the defendant's right to a jury trial under the Sixth Amendment to the U.S. Constitution.

He indicated the American Bar Association is recommending standards for death penalty prosecutions when offenders are mentally ill. These standards exclude voluntary intoxication from the list of mental impairments that can be used as a defense against the death penalty.

Indiana statutes allow a defendant to plead guilty but mentally ill, which can be used as part of a plea bargain. While this provision has helped some defendants avoid the death penalty, at least one defendant has received a death sentence.

In order to exempt a mentally ill person from the death penalty, a hearing to determine eligibility could be conducted prior to the actual trial Presumably, if the court determines that diminished capacity has occurred because of mental illness, the person would be exempt from the death penalty.

Once a condition is described in law, the condition becomes a legal term and no longer a medical term. Consequently, the sentencing court will examine how a term is written in law rather than how the term is applied in the medical field.

Paula Sites – Assistant Executive Director Indiana Public Defender Council

Ms. Sites' written presentation is included as Exhibit A of these minutes.

She told Rep. Foley that a defendant found guilty but mentally ill under the current Indiana law remains eligible for the death penalty. James Harris had pled guilty but mentally ill and was sentenced to death in 1983. While he was challenging his death sentence upon appeal, the state agreed to 160 years in prison for murder, kidnaping, and rape.

After the Atkins decision, which prohibits the execution of mentally retarded persons, the American Bar Association assembled a task force to develop a position paper on whether other defendants with diminished mental capacities should also be excluded from the death penalty. A copy of this position paper can be found at:
http://www.abanet.org/disability/docs/DP122A.pdf

During a question-and-answer period with Commission members, Ms. Sites stated that:

- Mentally ill persons may be less morally blameworthy but still must be punished for committing violent crimes.

- Because of their often flat affect and limited connection with reality, juries are often afraid of mentally ill defeats.

- In court hearings, some mentally ill offenders will deny that they have any type of mental illness and want to waive their right to appeal.

- The guidelines suggested by the American Bar Association for death penalty exemptions distinguish persons with severe disorders or disabilities from those persons with mental conditions that in and of themselves cause impairment at the time of the crime that are primarily manifested by criminal behavior and persons who abuse psychoactive substances.

Steve Johnson, Executive Director, Prosecuting Attorneys Council

Mr. Johnson told the Commission members that the following elements of fairness are included in current practice, statute, and Supreme Court rule.

- Prosecuting attorneys consider potential mental illness of a criminal defendant before requesting the death penalty.

- During the guilt phase of the trial, the prosecuting attorney must prove that the defendant knowingly and intentionally committed the crime. In addition, the jury is not permitted to know about the defendant's criminal history.

- During the sentencing phase, the jury must consider the mitigating and aggravating factors that lead up to the trial. One of the mitigating factors is whether the defendant was substantially impaired as a result of mental disease or defect or of intoxication. In addition, the jury may not consider a victim impact statement in determining the sentence.

- The Supreme Court's Trial Rule 24 requires two qualified attorneys and a large budget for criminal defense.

- Finally, if all else fails, the governor of Indiana can either commute a sentence or issue a pardon.

Keith Henderson, Prosecuting Attorney, Floyd County, President of the Indiana Prosecuting Attorneys Council

Mr. Henderson described the capital litigation committee which is composed of prosecuting attorneys who are experienced with trying the death penalty. Frequently, when a person has been charged with murder, a prosecuting attorney will consult this committee to determine whether there are sufficient aggravating factors that would qualify the prosecuting attorney to seek and successfully get a death penalty from a jury.

Generally, prosecuting attorneys will not file a death penalty request if a defendant in a murder case can be found to be mentally ill and could give pause to a jury or a judge.

He told the Commission members that because mental illness is difficult to define, it can have many diagnoses making almost any defendant exempt from the death penalty. Since the death penalty is the law of the land, he encouraged the members to follow the will of the people and allow the death penalty to be used.

During the ensuing discussion, Rep. Orentlicher asked whether the proposal issued by the American Bar Association could be modified so that it doesn't exclude every offender.

Sen. Rogers noted that the General Assembly changes statute when it receives new information. As an example, while the death penalty has not been repealed, it has been modified over the years to exclude persons who are mentally retarded and under the age of 18. She suggested that modifying the statute to exclude certain mentally ill persons would not necessarily repeal the death penalty.

Sen. Talian asked whether the burden of proof and presumptions of mental illness fall on the defendant or the state to prove mental illness. Generally, the burden of proof is on the defendant to prove the factors that would mitigate the severity of the sentence.

Sen. Waltz asked about the culpability of mentally ill persons who are convicted of murder and did not take their necessary medications.

Prosecuting attorney Henderson, in response to a question from Rep. Foley, indicated that his office filed a request for a death penalty in 2002 but agreed to life without parole at a later point. He indicated that the question of mental illness is routinely raised by defense counsel in the early stages of a trial.

Sen. Bray commented that when he served as a prosecuting attorney his office had a list of expert witnesses that was different from the expert witnesses that the defense counsel used to testify about the mental state of a defendant.

Sen. Steele requested staff to distribute a report prepared by the Criminal Justice Institute in 2001 that examined the application of the death penalty in Indiana.

Rep. Orentlicher asked about the comparative risk of error associated with executing a

person who is mentally ill with sentencing a person with no mitigating factors to life without parole.

Rep. Orentlicher adjourned the meeting at 4:00 p.m.